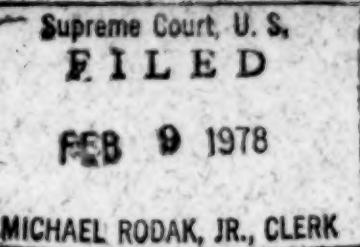


No. 77-827



In the Supreme Court of the United States
OCTOBER TERM, 1977

DONALD J. WILSON, SR., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks review of his convictions for tax evasion and filing false corporate returns on the grounds that the trial court erred in failing to instruct that no verdict of guilty could be returned without proof of a substantial tax deficiency and in instructing the jury that the only issue for it to decide was that of willfulness.

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on three counts of willfully attempting to evade his individual income taxes for 1970, 1971 and 1972, in violation of 26 U.S.C. 7201, and on three counts of making and subscribing false corporate income tax returns for the Mercer Tire Co. for the taxable years ending March 31, 1970, 1971 and 1972, in violation of 26

U.S.C. 7206(1). The district court sentenced him to one year in prison on a tax evasion count and suspended sentence on the remaining counts. It also imposed fines totaling \$21,000 (P.A. A-1 to A-3).¹ The court of appeals affirmed (Pet. App. 2a-3a).

The evidence showed that petitioner, who was president and owner of the Mercer Tire Company, diverted money to himself from the corporation over a period of years. The diverted funds amounted to approximately \$24,000 returned to petitioner by a tire casing supplier, who accepted checks of the corporation drawn in excess of the purchase price and returned the difference in cash to petitioner. Petitioner kept the cash and did not account for it on the corporate books. There were also a number of bonus checks for volume purchases made payable to the corporation by Firestone Tire & Rubber Co., which petitioner diverted from the corporation, cashed, and did not account for on the corporate books. Petitioner's diversion of the cash and checks resulted in an overstatement of the cost of goods sold on the corporate tax returns and understatement of income. Moreover, petitioner did not report the funds he diverted on his personal income tax returns (Tr. 18-26, 57-62, 149-161, 165, 170-184, 242-243; Gov't Exh. 107). The total unreported taxable income received by petitioner during the three prosecution years was in excess of \$34,000; the corporation's gross profit was understated during the three corresponding taxable years by more than \$33,000 (Tr. 238-241; Gov't Exh. 107).

¹"P.A" refers to the Appendix filed by petitioner in the court of appeals. "G.A." refers to the Appendix filed by the government in the court of appeals. "Tr." refers to the trial transcript.

1. Petitioner contends (Pet. 7-14) that the trial court erred in failing to instruct that no verdict of guilty could be returned without proof of a substantial tax deficiency.² But petitioner did not advance this argument at the time the charge was given, as required by Rule 30, Fed. R. Crim. P. Indeed, when, out of an abundance of caution, the prosecutor suggested to the court (after the charge was given) that "**** it's a requirement, of course, that they find a tax deficiency in order to find evasion" (P.A. A-100; Tr. 459), petitioner's counsel clearly indicated that he was satisfied with that aspect of the charge³ and promptly went on to another point (P.A. A-100 to A-101; Tr. 459-460). Since he expressly advised the court that he was satisfied with this portion of the charge, petitioner cannot now complain that the charge was erroneous. *Johnson v. United States*, 318 U.S. 189, 200-201.

At all events, the trial court did instruct the jury that there had to be a substantial tax deficiency. After the prosecutor raised the point with the court, the court instructed the jury that it was not their "function to find that there was a sum in a specific amount, as long as there was just some substantial evasion of taxes" (P.A. A-101).

²This contention goes only to the propriety of the convictions on the three evasion counts and has no bearing on the three counts relating to false corporate returns. It is well settled that the existence of a tax deficiency is not an essential element under 26 U.S.C. 7206(1). *Schepps v. United States*, 395 F. 2d 749 (C.A. 5), certiorari denied, 393 U.S. 925; *Siravo v. United States*, 377 F. 2d 469 (C.A. 1); *Silverstein v. United States*, 377 F. 2d 269 (C.A. 1); *Hoover v. United States*, 358 F. 2d 87 (C.A. 5), certiorari denied, 385 U.S. 822.

³Defense counsel replied to the prosecutor's suggestion in these words (P.A. A-100; Tr. 459):

Well, Your Honor, Your Honor had referred to "there were no particular amounts, as long as it was substantial", several times.

2. Contrary to petitioner's further argument, the trial court correctly charged the jury that the only issue the jury had to decide was that of willfulness or intent (P.A. A-79, A-85, A-89). Petitioner conceded at trial that the tire casing supplier returned some \$8,000 to him, that he also received some \$18,000 in diverted Firestone checks, that these amounts were not recorded on the corporate books, and that there were additional taxes due and owing (G.A. 2b, 20b; Tr. 275, 302-305, 317, 341-356).⁴ Petitioner's sole defense, as stated in his opening and closing arguments, was lack of willfulness (G.A. 1b-35b). Once petitioner conceded that there was a tax deficiency, the trial court correctly charged the jury that the only issue before it was that of willfulness.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

FEBRUARY 1978.

⁴In his opening statement to the jury at the close of the government's case, petitioner's counsel stated, "Now there is no question that there is some money owed the United States government here * * * there is no question that the corporation, or Mr. Wilson, or perhaps both of them, owe some tax" (P.A. A-39; Tr. 275).